STATE OF MICHIGAN

COURT OF APPEALS

BROOKSIDE CROSSING, LLC, LAND ONE, LLC, and ECHO 45, LLC,

Plaintiffs-Appellants,

v

EATON COUNTY DRAIN COMMISSIONER, EATON COUNTY BOARD OF REVIEW, BRADLEY K. MORTON, SARAH L. REED, and CHARLES M. ZWICK,

Defendants-Appellees.

UNPUBLISHED
July 26, 2005

No. 262969
Eaton Circuit Court
LC No. 05-000157-AS

Before: Schuette, P.J., and Owens and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting summary disposition in favor of defendants in this case involving plaintiffs' challenge to a special assessment imposed on them in connection with a drainage project. We affirm.

This case arises from the imposition of special assessments to fund a drainage project for the Carrier Creek Drainage District in Eaton County. Plaintiffs are corporations that own properties within the drainage district. The Eaton County Drain Commissioner (Drain Commissioner) specially assessed those properties, along with other properties in the drainage district, to fund the drainage project at issue. In accordance with the Drain Code, MCL 280.155 to MCL 280.157, plaintiffs (and other parties) appealed from those special assessments, and a Board of Review was appointed by the Eaton County Probate Court. The Board of Review reduced the amounts of the special assessments on plaintiffs' properties, but did not accept their contention that no special assessment whatsoever should have been imposed on their properties because they did not benefit from the drainage project. In their appeal to this Court, plaintiffs continue to seek a complete removal of the special assessments on their properties.

I

The Drain Code proceedings from which this appeal arises are administrative proceedings. See *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001), quoting *Battjes Builders v Kent Co Drain Comm'r*, 15 Mich App 618, 623; 167 NW2d 123 (1969) ("Proceedings under the [D]rain [C]ode, other than condemnation proceedings, are

administrative proceedings."). With regard to such Drain Code proceedings, the review process and standard of review applicable in this Court are as follows:

> An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. This Court's review of the circuit court's decision is limited to determining whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." In other words, this Court reviews the circuit court's decision for clear error. A decision is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." [*Barak, supra* at 597 (citations omitted).]

II

First, plaintiffs argue, in effect, that the decision of the Board of Review was not supported by competent, material, and substantial evidence because there was no substantial evidence that the drainage project at issue conferred a special benefit on their relevant properties.

As an initial matter, we disagree with defendants' contention to the effect that the apportionment decision of the Board of Review is not subject to appellate review. MCL 280.161 plainly contemplates the availability of appellate review of such a Board of Review decision by allowing for an appeal to be "taken within 10 days after the filing of the report of the board of review."

However, in accordance with the applicable standard of review, we do not directly review the decision of the Board of Review to determine whether it was supported by competent, material, and substantial evidence. Rather, we consider whether the circuit court misapprehended or grossly misapplied the substantial evidence test, or in other words clearly erred in its application of that test, in its consideration of the Board of Review's decision. *Barak, supra* at 597.

The circuit court stated in its written opinion with regard to this matter:

> Plaintiffs first contend that the special assessments are invalid because the Carrier Creek project conferred no special benefit on their property. This Court disagrees. The record is replete with substantial evidence that all of the properties received a special benefit. Evidence was produced by the Drain Commission that all of the properties would result in substantial savings in costs of detention when the property is developed. While there was contrary evidence also submitted this Court only needs to determine if the Board's decision is based upon substantial evidence, which it was.

Shawn Middleton, an engineer, provided expert testimony on behalf of the Drain Commissioner during the Board of Review proceedings. Middleton testified that he analyzed detention requirements on the Brookside properties with and without the drainage project. Middleton estimated that, without the project, about 3.2 acres of the Brookside properties with an estimated value of $407,000 would need to have been committed to detention and that the associated construction costs would have been about $163,000 to $164,000. Accordingly, Middleton concluded that the project saved the Brookside properties a total cost of about $570,000 to $573,000.

With regard to the Land One parcels, Middleton indicated that, without the project, the Drain Commissioner's rules would require construction of detention facilities on those parcels, but that the project would prevent the need for such costs. Middleton estimated that about five and one-half acres of land with a value of roughly $687,000 would have been required for such detention and that construction costs would have totaled about $288,000 to $289,000, so that the total cost savings from the project for the Land One parcels from avoided detention expenses was about $975,000.

For the Echo 45 property,[1] Middleton estimated that the project avoided the use of land with an estimated value of $12,600 and construction costs of $43,000 for detention that would have been required without the project for a combined savings of $55,800.

Particularly in light of Middleton's expert testimony about the benefits of the drainage project to plaintiffs' properties in the form of reduced detention costs, plaintiffs have not established that the circuit court misapprehended or grossly misapplied the substantial evidence test, or otherwise clearly erred, *Barak, supra* at 597, in holding that the Board of Review's decisions with regard to the relevant assessments were supported by substantial evidence. The circuit court's remarks reflect that it correctly understood that its role was to review the record of the Board of Review proceedings to evaluate whether there was substantial evidence to support its relevant assessment decisions. *Id*. There is simply no basis to conclude that the trial court clearly erred in reaching the conclusion that these assessment decisions were supported by substantial evidence in light of Middleton's testimony detailing benefits to plaintiffs' properties from the drainage project according to his analysis. While plaintiffs presented testimony tending to support opposing conclusions, the circuit court properly recognized that its role was not to independently weigh such competing testimony, but merely to determine whether there was substantial evidence to support the challenged assessment decisions of the Board of Review. See *Fritz v St. Joseph Co Drain Comm'r*, 255 Mich App 154, 163; 661 NW2d 605 (2003) ("a court will not set aside findings merely on the basis that alternative findings could also have been supported by substantial evidence on the record").

In particular, plaintiffs have contended that their properties were not actually benefited by the drainage project and will even be burdened by greater flooding due to the project and presented expert testimony in support of that position. But Middleton testified that he did not

[1] This property was referred to as the "Echo Valley" property during this portion of Middleton's testimony.

agree with the claim that the Brookside properties would suffer increased flooding due to the project. Rather, he indicated that based on his analysis and likely further development in the area the project would result in "a net reduction in the floodplain down the road when this is developed [in] 10, 20 years of two to three feet, reducing the floodplain". Middleton acknowledged, in effect, that water would be stored on some of plaintiffs' property for a somewhat longer period of time than without the project, but explained that the elevation at which it would be stored would be "almost a foot and a half lower, which frees up some property along the fringes of that floodplain." In other words, Middleton indicated that the project would result in *less* of plaintiffs' property being flooded with water as a result of substantial precipitation. In light of Middleton's testimony indicating that plaintiffs' properties would receive significant benefits from the drainage project, we believe that the circuit court reasonably concluded that substantial evidence was presented to support the Board of Review's determination that such benefits would occur.[2]

We note that plaintiffs inaccurately cite *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 493; 597 NW2d 858 (1999), for the proposition that, "A determination of market value is necessary to determine whether benefits are proportional to the costs incurred." Contrary to plaintiffs' implication, *Ahearn* does not require that there be a determination of the specific market value of a parcel of property for a special assessment on that property to be valid. Rather, the *Ahearn* Court actually stated, "A determination of *increased* market value is necessary to determine whether the benefit is proportionate to the cost incurred." *Id*. (emphasis added). Further, it is evident from *Ahearn* that there need not be an exact determination or even close approximation of the overall market value of each parcel of property that is specially assessed in order for such an assessment to be proper. In particular, *Ahearn* involved a special assessment to help fund the construction of a facility for a sewer system to meet federal environmental requirements. *Id*. at 490-491. In relevant part, the plaintiffs in *Ahearn* attacked the special assessments on the ground that they did not result in an increase in the market value of their property. But this Court held that the relevant comparison was not between the market value of assessed property before and after an improvement, but rather between the market value with or without the improvement. *Id*. In upholding the special assessments at issue in *Ahearn*, the panel then stated that the defendant could not have continued providing sewer service to the properties at issue without the improvement and "the market value of plaintiffs' properties would undoubtedly have been substantially reduced" without such sewer service. Accordingly, it is apparent that there was nothing approximating an exact determination of the difference in value of the properties at issue in *Aheran* with or without sewer service, but that under the circumstances a special assessment to allow the continuation of sewer service to the properties was appropriate because it was apparent that it had a significant positive effect on the market value of the properties. Likewise, in the present case, neither the Drain Commissioner nor the

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[2] Notably, plaintiffs' arguments are entirely directed toward contending that no special assessments should have been imposed on them for the relevant properties due to the drainage project on the ground that their properties actually received no benefit from the project. Apart from this, they do not challenge (or even reference in their brief on appeal) the specific dollar assessments imposed on each of the relevant parcels.

Board of Review was required to determine the market value of each parcel of property that was specially assessed. It was sufficient that the Drain Commissioner presented evidence supporting a conclusion that the drainage project would provide increased market value to a parcel of property in order to support imposing a special assessment for the project on that property. As set forth above, the Drain Commissioner presented substantial evidence that the drainage project would allow the relevant properties to avoid significant costs related to detention of storm water that they would otherwise bear. As with the provision of sewer service at issue in *Ahearn*, it is apparent that this improvement would serve to increase the market value of the properties by reducing the expenses buyers would otherwise be subject to incurring in connection with developing the properties.

Plaintiffs also vaguely challenge the special assessments at issue on the ground that the Drain Commissioner presented a revised roll to the Board of Review on the last day of its proceedings, that the revised roll was not substantiated or explained in the record, and that plaintiffs did not have an adequate opportunity to challenge the apportionments made in that revised roll. But the decision of the Board of Review reflects that this revised roll merely reflected revisions ordered by the Board of Review. Plaintiffs were able to and did present arguments and evidence challenging the initial calculation of assessments by the Drain Commissioner. Then, as plainly contemplated by MCL 280.157, the Board of Review exercised its authority to make revisions to that roll (including revisions reducing assessments imposed on plaintiffs). Accordingly, we conclude that plaintiffs have not established any error in this regard.

Plaintiffs further attack the assessments in question because the determinations of benefits to their properties supporting the assessments considered rules promulgated by the Drain Commissioner. In this regard, plaintiffs argue that the Drain Code does not grant the Drain Commissioner the power to promulgate rules. However, as plaintiffs acknowledge, MCL 560.105(c), part of the Land Division Act, provides that approval of a preliminary or final plat shall be conditioned on compliance with "[a]ny published rules of a country drain commissioner, county road commission, or county plat board adopted to carry out the provisions of this act." Thus, the Drain Commissioner does have statutory authority to promulgate rules regarding real property with the consequence of a landowner being unable to obtain approval of a plat if it fails to comply with those rules. We believe it is apparent that development of the properties at issue to their best use would require approval of plats. Thus, contrary to plaintiffs' argument, they have not established that it was inappropriate for the Drain Commissioner or the Board of Review to consider rules promulgated by the Drain Commissioner with regard to the challenged assessments because those rules were properly considered in analyzing whether the assessments benefited the properties by facilitating their development.

Plaintiffs also argue that the special assessments at issue were unlawful because the Drain Commissioner failed to recognize and give appropriate credit for existing drains. However, plaintiffs' argument in this regard is predicated on accepting testimony from one of their experts that the properties already had adequate drainage. This view is plainly inconsistent with Middleton's testimony as set forth above. Accordingly, plaintiffs' argument on this point must be rejected in light of our conclusion that the trial court's holding that there was substantial evidence that the drainage project would benefit plaintiffs' properties should be upheld.

Plaintiffs further argue that the special assessments constitute an unconstitutional taking of their property in violation of the Fifth and Fourteenth Amendments because the drainage

project will not benefit or increase the value of their properties but rather will actually result in increased flooding to their property. Again, contrary to the premise of plaintiffs' argument, the Board of Review rejected plaintiffs' position that the project would not benefit their properties, and, as discussed above, the circuit court did not clearly err in holding that decision was supported by substantial evidence. Thus, plaintiffs have not established the factual predicate for their argument that they suffered an unconstitutional taking of their property.

III

Plaintiffs alternatively argue that the trial court erred in granting summary disposition in favor of defendants because the Drain Commissioner exceeded his statutory authority with regard to certain aspects of the drainage project at issue and, accordingly, that plaintiffs may not be assessed for these unauthorized improvements. Specifically, plaintiffs contend that the Drain Commissioner (1) lacked authority to use pipes with an inside diameter over thirty-six inches in the project and (2) improperly included certain drains in this project.

First plaintiffs argue that under MCL 280.191 the Drain Commissioner lacked authority to use pipes greater than thirty-six inches in diameter in the project and, thus, cannot assess plaintiffs for the cost of the unauthorized use of such pipes. In this regard, MCL 280.191, part of the Drain Code, provides in part:

> If the project includes a tiled relief drain, or the tiling of an existing open drain or any portion thereof, with a conduit a part of which has an inside diameter in excess of 36 inches or the retiling of an existing drain with a conduit, a part of which has an inside diameter in excess of 36 inches, then the petition shall comply with [MCL 280.71].

MCL 280.71 provides in part that a petition subject to its requirements

> shall be signed by a number of freeholders in said drainage district whose lands would be liable to an assessment for benefits, equal to ½ the number of freeholders whose lands would be traversed by the drain or drains applied for or abut on any highway or street along the side of which such drain extends, between the point where such drain enters such highway and the point where it leaves such highway and which lands are within the drainage district.

It appears to be undisputed that no petition signed by one-half of the requisite freeholders as provided for in MCL 280.71 was ever submitted with regard to the drainage project at issue. Thus, to the extent that MCL 280.191 and MCL 280.71 may have required the signatures of this number of freeholders to authorize use of pipe with an inside diameter over thirty-six inches as part of this project, those requirements were not met. The circuit court nevertheless concluded that plaintiffs were not entitled to relief on this ground because "plaintiffs submitted no evidence that a pipe over 36 inches was not necessary or that the cost of the 36-inch pipe was greater than an alternative way of performing the drain function with less than 36-inch pipe. There is no evidence that the plaintiffs have been harmed." From our review of the record, the parties have not submitted evidence directly addressing whether the use of pipes over thirty-six inches in inside diameter increased the costs of the project over what the costs would be if only smaller pipes were used. However, we agree with the trial court's indication that common experience

would indicate that using two (or more) smaller pipes at a given portion of the drainage project, i.e., pipes with an inside diameter of less than thirty-six inches, would most likely be more expensive than one larger pipe at that location, i.e., one pipe with an inside diameter over thirty-six inches. As the trial court stated at the hearing on defendants' motion for summary disposition:

> Well, I'm not an engineer, but logically if you use two pipes of the smaller version you'd accomplish the same thing, only it would cost more to do it. So if they, in fact, were putting in two pipes of 30 inches as opposed to one pipe of 50 inches or 60 inches it accomplishes the same thing except it costs more.

Accordingly, even assuming for purposes of discussion that the Drain Commissioner might be acting improperly in using pipe with an inside diameter over thirty-six inches in the project at issue, it does not follow that plaintiffs have established any legal error in their *assessments* for the project because it is most likely that any such impropriety actually serves to reduce the costs of the project and derivatively the amount of plaintiffs' special assessments. Under these circumstances, we believe it is apparent that it would be neither just nor equitable to reduce plaintiffs' assessments based on this claim regarding the type of pipe to be used in portions of the project. See MCL 280.157 (providing that the Board of Review shall order changes in apportionments that are "just and equitable" based on "manifest error or inequality" in apportionments). Accordingly, the trial court did not clearly err, *Barak*, *supra* at 597, in declining to grant relief to plaintiffs on this ground.

Plaintiffs further argue that the Drain Commissioner lacked authority to consolidate drains not listed in the petitions or the Final Order of Determination and, thus, had no authority to assess plaintiffs for the improvement of those drains. Specifically, plaintiffs assert that the relevant petitions and orders only provided the Drain Commissioner with jurisdiction to consolidate the Carrier Creek Drain and the Moon and Hamilton Drain, but that evidence presented before the Board of Review revealed that the project at issue contemplates work on other drains, including the Sherwood Forest Drain, the Dann Drain, and the Westland Park Drain. The circuit court rejected this claim on the ground that plaintiffs submitted no evidence the drains were improperly consolidated and that plaintiffs' references to the transcript of the Board of Review hearing did not support this claim. Likewise, plaintiffs' argument regarding this matter in their brief on appeal in this Court does not reference any evidence reasonably supporting a conclusion that the drainage project at issue improperly involves work on drains beyond the scope of the Drain Commissioner's jurisdiction for this project. Particularly, plaintiffs refer to a portion of the transcript of the Board of Review proceedings that consists of a colloquy among counsel, but nothing in this colloquy amounts to a stipulation or agreement that the Sherwood Forest Drain, the Dann Drain, or the Westland Park Drain was improperly included in the present drainage project. Likewise, plaintiffs vaguely refer to two maps, but they do not explain how these maps allegedly reveal an improper consolidation of drains, and we see no basis to reach such a conclusion from those maps. Thus, we conclude that plaintiffs are not entitled to relief based on the alleged improper consolidation of drains given their failure to meaningfully support this argument. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 359; 695 NW2d 521 (2005) ("A party waives an issue when it gives the issue cursory treatment on appeal.").

In light of our above rejection of the merits of plaintiffs' arguments related to the Drain Commissioner allegedly acting outside the scope of his authority, we need not reach plaintiffs' argument that the circuit court erred in regarding plaintiffs as estopped from making such claims based on the involvement of Michael Eyde, the owner of plaintiff corporations, in circulating a petition for the drainage project. Likewise, we need not consider defendants' argument that plaintiffs' claims in this regard are barred by the ten-day limitations period of MCL 280.161. We also note that certain other arguments presented by defendants effectively anticipate arguments that are not actually advanced by plaintiffs in this appeal.[3] Accordingly, we do not reach those arguments.

Affirmed.

/s/ Bill Schuette
/s/ Donald S. Owens
/s/ Stephen L. Borrello

[3] In light of the expedited nature of this appeal, the parties were previously directed by this Court to "simultaneously file their briefs on the merits." In other words, in contrast to the ordinary procedure in this Court, defendants in filing their brief as appellees did not have the normal opportunity to first review plaintiffs' brief filed as appellants.